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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *et al.*,
and
NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

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In opposing Supreme Court review of this case, respondents uniformly attempt to downplay the standard of review applied by the court of appeals below. They also uniformly characterize the passive restraint mandate as a long-standing agency policy which the National Highway Traffic Safety Administration (NHTSA) has allegedly abandoned in an unprecedented turnabout. Their approach could not be more unfounded.

I

IN CLAIMING THAT THE COURT OF APPEALS "BROKE NO NEW GROUND" WHEN IT OVERTURNED NHTSA'S DECISION, RESPONDENTS ATTEMPT TO MAKE A MOLEHILL OUT OF A MOUNTAIN

Respondents all argue that the court of appeals did no more than apply the traditional standard of review in overturning NHTSA. The National Association of Independent Insurers, *et al.* (NAII), claims that the opinion below "broke no new ground" and "did not announce a new principal *[sic]* of judicial review." NAII Opposition (Opp.) at 6, 8. The State Farm Mutual Automobile Insurance Company, *et al.* (State Farm), similarly contends that the court "applied the traditional standard for review" and engaged in "no . . . shifting of the burden in this case." State Farm Opp. at 8, 13; *see also* New York Superintendent of Insurance (New York) Opp. at 2. State Farm even has statistics to support this contention; according to it, the court employed the proper terminology of the arbitrary and capricious test "[n]o less than eight times." State Farm Opp. at 9.

In fact, NAII had explicitly argued below that the burden of proof should be shifted to NHTSA, and that is precisely what the court of appeals did. NAII had contended that

> "[t]he burden is on NHTSA, *and it is a heavy one*, to explain how [its] action is legal, rational and supported by substantial evidence." NAII Brief at 19 (D.C. Cir. Dec. 28, 1981) (emphasis added).

The court of appeals agreed. It took the heated and continuing congressional debate over passive restraints and made that its basis for an unprecedented standard of almost-but-not-quite congressional approval. In the

court's words, the congressional reaction to the passive restraint mandate

> "suggests that the standard has come as close as an agency-made regulation can come to being affirmatively endorsed by Congress, without Congress actually having done so." Opinion below, 680 F.2d 206, 222 (D.C. Cir. 1982), *reprinted in* Motor Vehicle Manufacturers Association Appendix (No. 82-354) (MVMA App.) 1a, 32a.

On the basis of this almost-but-not-quite standard, the court proceeded to place the burden of proof on NHTSA rather than on those challenging the agency:

> "It follows that NHTSA has the burden of explaining why it has changed course, and of showing that rescission . . . was reasonable." 680 F.2d at 229, MVMA App. at 47a (footnote omitted).

For the reasons previously set forth in our petition for certiorari, we submit that the court of appeals misread the congressional reaction and misused it in reviewing NHTSA's action. Petition for Writ of Certiorari at 7-14. However, regardless of one's view on this, it is unquestionable that the court utilized this congressional reaction to limit NHTSA's discretion[1] and to shift the burden of proof.[2] This resort to unenacted congressional reaction to

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[1] The court expressly rejected any suggestion "that the congressional actions and failures to act described above have no bearing on the agency's freedom to regulate on this question." 680 F.2d at 229, MVMA App. at 47a.

[2] The court explicitly tied both the level of judicial review and the burden of proof to the "path" which it claimed had been set for NHTSA by Congress:

> "Judicial scrutiny of agency action . . . depends on the extent to which the agency has deviated from congressional expectations. An agency is seldom locked on course, but it must have increasingly clear and convincing reasons the more it departs from the path marked by Congress." 680 F.2d at 229, MVMA App. at 48a.

restrict an unambiguous statutory delegation of authority is apparently without precedent; neither the court nor State Farm nor NAII nor anyone else has cited a single other case in which some almost-but-not-quite congressional approval has been put to this use, or for that matter to any use whatsoever.

Contrary to respondents' claims, there is nothing that is either "traditional" (State Farm Opp. at 8) or "typical" (NAII Opp. at 6) about the standard of review applied by the court of appeals. Perhaps it is true that, as State Farm claims, the court used the phraseology of the arbitrary and capricious test "[n]o less than eight times" in its decision. State Farm Opp. at 9. If that is so, then the court's repetitiveness in this regard does not support respondents' argument, but rather suggests an adage of Ralph Waldo Emerson: "The louder he talked of his honor, the faster we counted our spoons." The court's incantation of the arbitrary and capricious standard is no cure for the court's failure to apply it. The standard which the court actually used is so unprecedented as to warrant this Court's review.[3]

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[3] Contrary to NAII's suggestion (NAII Opp. at 6 n.8), the validity of the court's action cannot be judged by examining the standard of review applied by the judges below in *other* cases. The general competence of the judges is not at issue here, and NAII is grasping at straws when it attempts to introduce this subject.

II

CONTRARY TO RESPONDENTS' ASSERTIONS, THE HISTORY OF THE PASSIVE RESTRAINT MANDATE SUPPORTS THE AGENCY'S RIGHT TO RESCIND THAT RULE

The court's assessment that "NHTSA is not writing on a clean slate" played an essential role in its review of the agency's decision. 680 F.2d at 229, MVMA App. at 47a. Respondents go to considerable lengths to support this characterization. State Farm describes NHTSA's action as "the reversal of a long-standing agency rule" and the abandonment of "NHTSA's 12-year affirmation of the efficacy of passive restraints." State Farm Opp. at 11, 10-11. NAII refers to the "dozen years of relevant history" behind the passive restraint mandate (NAII Opp. at 8), and New York claims that NHTSA "is attempting to ignore ten years' administrative history." New York Opp. at 4.

Unfortunately, all of these characterizations omit one very important and very inconvenient fact. The passive restraint mandate which NHTSA rescinded is neither a dozen years old, nor ten years old, nor even five years old. It was issued in 1977. Its promulgation "reversed a prior policy" against requiring passive restraints that was set in 1976. *Pacific Legal Foundation* v. *Department of Transportation*, 593 F.2d 1338, 1343 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979). The 1976 policy, in turn, replaced a 1972 rule which had "foundered both in the courts and in Congress." *Id.* at 1341.

In short, the lineage of the passive restraint mandate is, like many genealogical assertions, quite a bit less than that claimed by its proponents. The slate upon which NHTSA has written may not be clean, but it has been erased often enough to dispel the notion that the passive

restraint mandate is imbued with historical necessity. Shorn of respondents' revisionism, the history of the passive restraint issue supports rather than undercuts NHTSA's right to act as it did.

CONCLUSION

For these reasons, and for the other reasons set forth in the petitions in this case and in Case Nos. 82-354 and 82-398, the decision of the court of appeals should be reviewed by this Court.

Respectfully submitted,

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